In the Supreme Court of the United States

OCTOBER TERM 1970.

No. 71-161.

LOUIS S. KERR,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF RESPONDENT IN OPPOSITION.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio but have not been presented to the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court sustained the State's motion to dismiss for failure to perfect a timely appeal.

The Ohio Appellate court decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

Louis S. Kerr was tried to a jury and found guilty of a total of 22 counts charged in two indictments. One indictment contained ten counts of selling a motor vehicle without delivering to the purchaser thereof a certificate of title, as follows:

Count 1—1962 Chevrolet to Chester Basnett
2—1961 Ford to Andrew Ryba
3—1963 Studebaker to Susan Cass
4—1963 Studebaker to Anna Vogel
5—1961 Chrysler to Sam Dituri
6—1963 Studebaker Lark to Charles Sefcovic
7—1963 Studebaker Hawk to Jay Williams
8—1962 Studebaker Lark to Marcia Nease
9— Studebaker Wagoneer to Rheta Fugueroa
10—1963 Studebaker Wagoneer to Roy L. Bolton

The charges in the second indictment of which Kerr was found guilty were:

Count 2—Obtaining an automobile of the value of $2,237 from Evan B. Brewster by false representation
3—Forgery of power of attorney from Herman Adelstein
4—Uttering above forged power of attorney
7—Uttering check with insufficient funds, payee Julius Sanpetrino
8—Uttering check with insufficient funds, payee Acme Radiator
9—Uttering check with insufficient funds, payee Alex Gaye
10—Uttering check with insufficient funds, payee May Company

11—Uttering check with insufficient funds, payee May Company
12—Uttering check with insufficient funds, payee May Company
13—Uttering check with insufficient funds, payee May Company
14—Uttering check with insufficient funds, payee May Company
15—Uttering check with insufficient funds, payee May Company

THE STATE'S EVIDENCE.

All the offenses occurred in the summer of 1963 at the Louis S. Kerr Motors, Inc. automobile sales agency branches on Mayfield Road in Cleveland Heights and Ridge Road in Parma.

In the first part of July 1963 *Susan Cass* went to the Kerr agency to buy a car. After she made a test drive on a Studebaker Lark and conversation with Mr. Kerr about a car of the desired color, a contract (St. Ex. 1) was written up. The price was $1,990. Mrs. Cass' husband, Edward Cass, was shown as the purchaser. Mrs. Cass paid for the car with a check for $1,990 signed by her father. While the salesman was writing up the contract, Mr. Kerr showed them color charts, and assured them he could get a car of the color they preferred. The deal included the trading in of their old car; Mr. Kerr approved the trade-in allowance. When Mr. and Mrs. Cass received the new car that afternoon it had dealer's plates. When she took it in three weeks later to have a heater installed she inquired why they had not received the certificate of title. Later she phoned Mr. Kerr about the title. He said there was gross incompetence in his office, he would see to it immediately. At the end of that week

Mrs. Cass drove to Kerr Motor Sales and complained about the lack of title.

On March 31, 1964, just in time to get license plates, Mr. and Mrs. Cass received a certificate of title. They never received a clear title to the car they bought and the memorandum certificate of title they did receive showed a lien of $1,325. When they signed the purchase agreement and gave the salesman the check they did not owe anything on the car. Mrs. Cass' father was buying a car for her and they bought it in her husband's name.

The records of the Clerk of Courts of Cuyahoga County showed a lien of $1,325 to Evan B. Brewster of Akron. The date of the lien was March 31, 1964.

Early in August, 1963 *Charles Sefcovic* went to the Parma office of the Kerr Motor Sales after being called by a salesman and asked if he was interested in a car. The Sefcovics did not buy one on that occasion but they returned on August 10th and selected a 1963 Studebaker, giving the salesman a $10 deposit. An allowance of $658 was made for their old car. On August 12 they returned to pick up the new car and turned over a check for $1,693.76 in full payment. The manager changed their old license plates to the new car. They turned over the certificate of title to the old car after signing it on the back.

About a week later, when the Sefcovics went back to Kerr Motors after some adjustment had been made on the new car, they asked the manager about the title. They called again at the Kerr Motors and then Mr. Sefcovic made a series of telephone calls asking for the certificate of title. He never did receive it.

The records of the Clerk of Courts showed a chattel mortgage of $1,899.59 to the Union Acceptance Corporation, 75 Public Square, dated March 31, 1964, on the automobile in question.

About the first of August, 1963, *Marcia Nease,* a teacher, took her 1959 Studebaker Lark to the Kerr Motors to have it repaired. While there she looked at new cars and decided to buy a 1963 Lark. The car she wanted was not in the salesroom. She went to Erie, Pennsylvania, and while she was there a salesman from Kerr Motors came to see her and brought with him a 1962 Lark. About two weeks later Miss Nease went to the Kerr Motors Parma branch and bought the 1962 Studebaker Lark that the salesman had brought to Erie, paying for it with two checks and $5 cash. She did not receive any certificate of title for the new car. Title to her old car was turned over to the Kerr salesman. When she inquired of Mr. Kerr about the certificate of title, he told her it was in the hands of his attorney, Mr. Nosan. In September, 1963, Miss Nease was informed by Mr. Evan Brewster of Akron, that he had title to that car.

The records of the Clerk of Courts concerning the original certificate of title to the car in question showed an undischarged chattel mortgage of $1,616 to Evan Brewster, dated May 13, 1963, and an assignment to Miss Nease by "Marvin R. Blane," attorney for the trustee for L. S. Kerr Motors, dated March 26, 1964.

Sam Dituri bought a 1961 Chrysler Imperial in July of 1963 from the L. S. Kerr Motors, Parma branch. He paid $1,942.10 in cash and traded in a 1959 Chevrolet valued at $600. Mr. Dituri never received title to the Chrysler and although he had possession of the car at the time he testified in this case, he could not drive it. He could not get license plates because he did not have title to the car. When Mr. Dituri went to Kerr Motors a week after he bought the Chrysler to ask for the title he was told it had not come yet, to wait a week or ten days. He continued going there every other week. Mr. Dituri testified: (R. 149)

"Well, told me wait, told me the last time I call that is the Kerr Motor himself, and he told me, he said the clerk was on a vacation, he said, that is why the delay the title to come, but seeing the clerk is here now you get the title, maybe tomorrow. So two days after he close up the place, so I never get no more title."

The Clerk of Court's records show a certificate of title from Rutherford Motor Sales of Akron, assigned to L. S. Kerr Motors, and a new certificate of title in the name of Kerr Motors showing an unsatisfied lien of $2,095 held by Evan B. Brewster.

Anna E. Vogel, retired, visited the Kerr Motors about July 30, 1963, to buy a Studebaker car. She selected a white Lark DeLuxe model, on which delivery was to be made in a few days. The contract drawn up by the Kerr salesman stipulated a price of $2,215.53, to be paid by a trade-in allowance of $750.00 for her 1960 Valiant, a cash deposit of $550.00, and the balance of $1,000.00 to be paid on delivery. She paid the deposit with two checks, for $200 and $350, respectively, and turned in the assigned certificate of title to the Valiant. About ten days later, when she had not received the new car although she had turned in the title to her old one, she went to the showroom and talked to Mr. Kerr. In the course of the conversation Kerr told her to go home and call him in the morning. A few days later Miss Vogel went in and demanded her down payment and the certificate of title to the Valiant.

Miss Vogel learned from the Bureau of Motor Vehicles that there was a lien of $450 on the Valiant to Evan Brewster of Akron, Ohio. She bought the title back from Brewster for $100. She never received back any of the $550 she paid to Kerr Motors.

The records of the Clerk of Courts show a lien dated August 5, 1963 in the amount of $450 to Evan B. Brewster on the certificate of title to the Valiant in question. The lien was cancelled March 6, 1964. The District Court issued an order to the trustee to abandon this car.

Chester K. Basnett saw a 1962 Corvair in the west side lot of Kerr Motors that he was interested in. This was on August 8, 1963. After he drove the car around the block he discussed a price of $1,700 with a salesman, without agreement. The next day Mr. Basnett went back and informed another salesman that he would pay $1,700 cash. He had that amount with him in cash. He was told the sale would have to be approved by Mr. Kerr. After a phone call he signed a contract calling for a total price of $1,710.88 with no trade-in. Mr. Basnett took delivery of the car, which carried dealer's plates.

Mr. Basnett went back to Kerr Motors three days later to pick up his title but did not get it. He continued to demand his title every two or three days, but never received it. He testified (R. 202-203, 204)

> "Three weeks later I talked to Eugene Knable at west side branch, and I told him I wanted that title to my car, which he said he could not produce, and I told him, I said, well, I will have to get my lawyer. Eugene Knable then told me the best thing for me to do would be to get my lawyer, that the bottom had fallen out of everything, and I wouldn't get the title to my car. I then proceeded to the east side branch on Mayfield Road to speak to Mr. Kerr. Previously I made a phone call, but I couldn't get hold of him. I talked to his secretary about my car title. Went to see Mr. Kerr that day, and at that time he told me that he would get my title by Friday, if he delivered it to the house by some man, someone, and if I didn't receive my title on Friday, to call him personally and tell him.

Q. Was there any other discussion had at that time?

A. Yes, there was. He told me where the hold-up was on the title. He was having difficulty with income tax. Why, he said that the Government was after him for back income tax, couple years back, that the previous owner there didn't pay his income tax, and he was being stuck with it, more or less.

Q. Was there anything else said other than that?

A. Nothing only that he promised my title to the car on Friday."

It developed that Allstate Motors had legal title to that car and Mr. Basnett turned the car over to them. The records of the Clerk's office covering this car showed title was assigned by Ed Stinn Motor Sales to Allstate Motor Sales on July 9, 1963, and a certificate of title was issued to Allstate on September 22, 1963.

In June 1963 *Rheta Fugueroa* talked to Mr. Louis Kerr about a car she saw in the Kerr salesroom on Mayfield Road and about how much he would allow for a trade-in, payments, etc. She signed a purchase agreement for a total price of $2,900, less $420.84 for her old car. She gave Kerr $474.95 in cash, which left a balance of $2100. She financed this with the Cleveland Trust Company, receiving a check for $2100 which she turned over to Mr. Kerr. She received the new automobile. The Cleveland Trust Company requested that the certificate of title to the new car be turned over to them within ten days. Mr. Kerr said he would take care of it. Two weeks later the bank inquired of Miss Fugueroa as to where the title was. She related her subsequent conversation with Mr. Kerr (R. 213)

"I just told Mr. Kerr that I had received a phone call from the bank, and they said they had not received the title yet, and he said that I didn't need to worry,

> he would send the title down to the bank, and there were people on vacation, it was during vacation, and he said there were people on vacation and probably they had misplaced it."

After another communication from the branch manager of the bank, she tried to see Mr. Kerr and he was always tied up. When she finally saw him the following occurred: (R. 214)

> "Well, I told Mr. Kerr that I would like to have my title by that afternoon, and he asked me if I could wait two or three days more until he had a few things to straighten out."

Miss Fugueroa learned that Mr. Brewster had title to the car. She received a temporary title, which permitted her to obtain license plates. It showed a lien for $2,205 in favor of Mr. Brewster. The result was that in addition to the money owed the Cleveland Trust Company, there was the lien of $2,205. The records of the Clerk of Courts showed a certificate of title for this car issued to Rheta Fugueroa on May 26, 1964, previous owner, L. S. Kerr Motors, and a chattel mortgage to Brewster in the amount of $2,205.

On June 24, 1963, *Roy Bolton* went to the Kerr Motors to buy some parts. After talking with a salesman, George Foltz, he looked at cars and decided upon a 1963 Studebaker Hawk, pink in color. After a contract was drawn up, Don Warner told Mr. Bolton there was a more desirable car, a white one, on the West Side that he could take instead and he could have it for the same price of $3500. Mr. Bolton paid $3500 and received the car. A few days afterwards he talked to Mr. Warner, to Mr. Foltz, and to Mr. Kerr about title to the car and thereafter he went back about every week to ask for his title. He talked with Mr. Kerr several times. He never received the title to the

car, only a temporary certificate of title, which showed a lien of $3400 to the Union Acceptance Corporation.

Mr. Kerr deposited the Bolton's check for $3,500 before they were able to transfer funds to cover it and the check was returned. Mr. Bolton made it good. As to this, Mr. Bolton testified: (R. 233)

> "Q. Would you tell us what was said?
>
> A. Well, he wanted—he said he has got a big deal going, say you pay cash for the car it would help me out that much. So we wrote a check—my wife wrote a check out for the amount.
>
> Q. What was that?
>
> A. $3500. And told him not to get it cashed until after Thursday, because she had to work on Tuesday, this was Monday, she had to work on Tuesday, the bank was closed on Wednesday. She couldn't get to it again to change it from the savings account to checking account until Thursday."

The records of the Clerk of Courts showed a certificate of title in the name of Roy Bolton issued March 31, 1964, previous owner, L. S. Kerr Motors, Inc. and a chattel mortgage of $3,124.41 held by the Union Acceptance Corporation.

Jay E. Williams visited the West Side branch of Kerr Motors on July 31, 1963 to look at cars. Not seeing a car there, that he wanted, he discussed the possibility of ordering one from the manufacturer and was asked if he wanted to look at a car at the East Side branch. He went to the East Side and after talking to Mr. Kerr they drew up a purchase order for a 1963 Wagoneer, which was in the salesroom. The price was $1,381.77 and Williams' 1962 Volkswagen, which was given a trade-in allowance of approximately $1,100. The $1,381.77 was paid by bank check and the Wagoneer picked up the next day at the

East Side agency and the Volkswagen turned in. Mr. Williams instructed his bank to mail the title to the Volkswagen to Mr. Kerr. He testified that in talking with Mr. Kerr: (R. 291)

> "He told me that there was an error in the preparation of the title or the transfer and that it was necessary that they apply to the Studebaker Corporation to get a good title which would take approximately a week or so, then I would have it."

The bank called Mr. Kerr and was assured that he would have the title delivered to Mr. Williams within three days. Not receiving the title, Mr. Williams went to see Mr. Kerr and was told that everything was being taken care of, that Mr. Williams would receive his title, that the particulars were confusing, and he should contact Kerr's attorney, Mr. Nusan. Mr. Williams ultimately received a memorandum copy of the title to the new car showing a lien of $2,255.26 in favor of the Union Acceptance Corporation.

In January 1962 Louis Kerr employed one *Richard Kissroczi* as a salesman for L. S. Kerr Motors. In July 1963 Kissroczi's duties included running titles, that is, taking titles to the Title Bureau for transfer. He did this at the direction of Louis Kerr. He first saw State's Exhibit 42, a title to a 1962 Volkswagen when he picked it up at the Central National Bank and took it to Kerr Motors, where it was filled out by Dollie Reed to transfer the title to L. S. Kerr Motors. There was no signature on the assignment, and when Richard Kissroczi called this to Mr. Kerr's attention, Kerr told him, "Well, go ahead and take care of it." Richard saw a pink power of attorney in the envelope containing the papers on the Williams purchase. The power of attorney was not filled in and was not acknowledged before a notary. After the certificate of title

to the Volkswagen had been transferred to Kerr Motors, Richard took it to Akron and gave it to Mr. Brewster and received another envelope from Brewster.

Richard testified he had not seen State's Exhibit 37, a memorandum certificate of title application bearing the signature of Herman Adelstein. He said the signature was not his writing. At this point the prosecutor stated he had been taken by surprise and asked permission of the court to cross-examine the witness. On cross-examination Richard was questioned as to statements he had made to Mr. Hill and Miss Abrams of the Bureau of Motor Vehicles.

Concerning a certificate of title in the name of Herman Adelstein, which Richard obtained from the Cleveland Automobile Club on July 11, 1963, Richard testified: (R. 338-339)

> "First thing I did was Mr. Kerr call me in the office and told me to go pick up his title, have it transferred into Kerr Motors name. So I went to the business office, checked Dr. Adelstein's jacket. There was no power of attorney there and I went back to Mr. Kerr and I told him there was no power of attorney and Mr. Kerr stated that it was all right, Dr. Adelstein had given us power to sign Dr. Adelstein's name. So I went down to the Auto Club and picked the title up. I went to the Bureau and had it transferred into Kerr Motors name.
>
> * * *
>
> Q. Will you tell us what did you do with respect to the power of attorney?
>
> A. Well, after that when Mr. Kerr stated I could sign Dr. Adelstein I went to the office, got a power of attorney and I signed Dr. Adelstein.
>
> Q. You signed Dr. Adelstein's name to the power of attorney?
>
> A. I did.
>
> Q. After you signed that power of attorney will you tell us what you did?

A. Took to the title bureau and had it transferred in Kerr Motors name."

After having the signature notarized he took the envelope to Akron and delivered it to Mr. Brewster and in turn received another envelope. Dr. Adelstein never gave Richard Kissroczi authority to sign Dr. Adelstein's name.

Mr. James Bartels, the president of the Union Acceptance Corporation, testified to his floor plan arrangement with Mr. Kerr: (R. 382)

"Well, I would pay for the cars at the factory and I would hold the statement of origin of the car. The car would be delivered to L. S. Kerr Motors and when the car was sold I would have been paid off for the car and get my money back.

Q. What would you do with the statement of origin?

A. I would hold the statement of origin.

Q. After that was paid what would you do?

A. I would release it to the selling dealer.

Q. The dealer would be L. S. Kerr?

A. That is right."

Mr. Bartels was asked: (R. 390)

"Q. Show you State's Exhibits 34, 10, 33 and 36, will you tell us what is still owed on these vehicles?

A. Title in name of Jay E. Williams, $2,255.26 owed; certificate of title made out to Charles Sefcovic $1,899.59 is owed; certificate of title made out to Roy L. Bolton, $3,124.41 is owed; certificate of title made out to Herman Adelstein $3,110.89 is owed.

Q. And the reason for the lien described thereon and the reason for giving titles is what? What is the reason?

A. For my security.

Q. Why did you give these people titles?

A. I put titles in their names with liens noted on them because these people could not secure license plates to drive the cars.

Q. License plates for what year?
A. 1964."

Evan B. Brewster agreed to floor plan cars for Louis Kerr in the summer of 1961, on a personal basis, that is, personal guarantees by Mr. Kerr, who had told him he owned and controlled the business of Kerr Motor Sales, Mrs. Louis Kerr, and the other two stockholders, Hilda and Gail Zdolsek. Mr. Brewster described the floor plan arrangement as follows: (R. 440-441)

"Q. In conducting a business with Kerr Motors, would you tell us exactly what your function was with respect to the factory and what Mr. Kerr's function was with respect to the factory?

A. I started as the floor-plan financer on an agreed upon line for both used and new cars. Mr. Kerr would send me his purchase orders of copies of his purchase orders and I would pay for drafts against these orders for which title was sent to me. I could then lien the title, record is in Cuyahoga County, bill the company and hold the title on the floor-plan account.

Q. Now, you said a car would be ordered, say a new car. What would be sent to you?

A. Mr. Kerr would send me duplicate copies of the essential information concerning the car on forms we prepared and he would send, at the same time, a check for the equity on that car. Many cars were six per cent of the F. O. B. price plus a freight allowance, as I recall.

Q. What would the Studebaker Company send you?

A. The Studebaker Company would ship the car directly to Kerr and would send a draft through my bank with the invoice and manufacturer's certificate on that car in a draft envelope. When I paid the draft to the bank, then I received the company's invoice and certificate of origin."

In July 1963 Mr. Brewster received a certificate of origin on a 1963 Hawk, serial No. 63 V 34587 (St. Ex. 47). It was added to the floor plan for $2,290. The lien was paid off by Kerr and the certificate sent to him. The same evening Louis Kerr told Mr. Brewster the deal had been revoked and he was sending the certificate back to refloor for $1,400. Mr. Brewster advanced $1,400 on that invoice. Later on, Kerr told him that they had sold and delivered this car out of trust to a Miss Oppenheim, and it developed that a second certificate of origin for the same car had been sent by Studebaker Corporation to Kerr Motors.

Mr. Brewster testified to the details of all the transactions in which cars on which he had liens were sold by Kerr Motors without the liens having been paid off. He never received payment for any of them except a $100 settlement he made with Miss Vogel. He was cross-examined extensively by defense counsel (R. 472-595) as to his dealings with Kerr Motors.

Mr. Robert L. Corns of the special records department of The Cleveland Trust Company, testified to a series of checks drawn on the Cleveland Trust Company accounts of L. S. Kerr Motors and signed by Louis Kerr. When these checks were presented for payment they were all returned, either for insufficient funds or that the account was closed.

On August 26, 1963 the L. S. Kerr Motors issued a check signed by L. S. Kerr for $362 to the Acme Radiator Company in payment of an invoice for that amount. The check was deposited in the name of the Acme Radiator Company's bank account. The company received a notice from the Cleveland Trust Company that Kerr Motors had closed their account on August 26, 1963. The check was never made good.

A check for $100 dated August 27, 1963, issued by L. S. Kerr Motors, Inc., signed by L. S. Kerr, endorsed by Dick Kissroczi, was cashed by Kissroczi at a tavern owned by Alex Gaye. Gaye gave Kissroczi $100 in cash and later deposited the check in his account. The check was returned from the Cleveland Trust Company with a notice that the account was closed.

State's Exhibit 49 is a check payable to Julio Sanpetrino, issued by L. S. Kerr Motors Company, signed by L. S. Kerr, President, drawn on the Cleveland Trust Mayfield-Lee Office. The check bears the endorsement by Julio Sanpetrino, and an okay by a store manager of Heinen's, Incorporated. The check was returned by the bank with a notice that the account had been closed. The store manager paid the Company. Another check, in the amount of $69.80, signed by L. S. Kerr, President, payable to George Foltz was returned to Heinen's because the account had been closed.

Francis W. Biehl, the general credit manager at the May Company, identified a series of checks cashed at the May Company and returned unpaid, as follows:

State's Exhibit 50: drawn by L. S. Kerr, Motors, Inc. signed L. S. Kerr, payable to Barbara Kerr for $150; returned by the Cleveland Trust Company because account was in litigation.

State's Exhibit 51: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, payable to George Foltz, for $120.25, endorsed by George Foltz; returned by Cleveland Trust Company not paid.

State's Exhibit 52: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, payable to George Foltz for $88.97, endorsed by George Foltz; returned by Cleveland Trust Company, account closed.

State's Exhibit 53: Check drawn by L. S. Kerr Motors, Inc. by L. S. Kerr, President, dated August 22, 1963, payable to Don Warner, for $291, endorsed by Don Warner; returned from Cleveland Trust Company unpaid, account in litigation.

State's Exhibit 54: drawn by L. S. Kerr, Inc., by President L. S. Kerr, payable to L. S. Kerr, for $200, endorsed by L. S. Kerr, second endorsement by Barbara Kerr; returned by Cleveland Trust Company unpaid, account closed.

State's Exhibit 55: drawn by L. S. Kerr Motors, Inc., signed by L. S. Kerr, President, dated August 22, 1963, for $241, payable to Don Warner, endorsed by Don Warner; returned by Cleveland Trust unpaid, account in litigation.

DEFENSE EVIDENCE.

The major portion of the testimony in the bill of exceptions was presented by the defense and was directed to establishing, first, that Louis S. Kerr should not be held personally responsible for transactions done in the name of the corporation; second, that any and all of the fraudulent acts for which Kerr was being tried came about as the result of the heavy financial burden imposed by the floor-planners, notably Mr. Brewster, which resulted in his being forced into bankruptcy.

The defendant took the witness stand. His testimony on direct examination covers three hundred pages of the record. He gave a long and detailed recital of his operations of the automobile agency, commencing with his purchase, with money furnished by the Zdolsek sisters, for $61,000 of the stock of O'Malley Porach, Inc. which had operated a Chrysler agency at the Mayfield Road address. Kerr claimed he negotiated this deal in 1961 without ever finding out whether the Chrysler Corporation would grant

him a franchise to sell Chrysler cars and without ascertaining the financial worth of the corporation whose stock he was purchasing. Eventually, after a period of months during which he kept the business operating on capital advanced by the Zdolseks, a floor planning arrangement was made with Mr. Brewster and a Studebaker franchise obtained.

The defendant admitted that all the fraudulent sales charged in the indictment had been made, that all the checks had been written and cashed when there was no money in the bank to cover them, because cash was needed in the operation of the business, but claimed that he was innocent of any wrongful intention. He attributed all financial difficulties to exorbitant financing requirements imposed by Mr. Brewster and to his own altruistic desire to keep the business going for the benefit of the employees.

ARGUMENT.

The petition herein is devoted chiefly to arguing the denial of a fair trial under the Fourteenth Amendment by reason of alleged erroneous rulings of the trial court in the course of the trial. These claims of error, involving for the most part the admission of evidence and Ohio trial procedure, furnish no ground for this Court's intervention. The due process clause of the Fourteenth Amendment does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in the state court.

Moreover, there is no merit to the claim that the petitioner did not have a fair trial, either by reason of the court's decisions claimed to be erroneous or by reason of the alleged denial of the right of confrontation, as the following discussion of the subjects presented in his petition shows:

> I. The petition alleges: The refusal of the trial judge to give additional instructions upon matters of law when requested to do so by the jury constitutes prejudicial error by depriving the accused of a fair and impartial trial.

Actually defense counsel did not want any further charge going to the jury and the State did not press the matter. Therefore, the court refused to charge the jury any further, but told them to recall the court's charge in its totality. There was no objection on the part of the defendant to the court's action.

The Ohio rule is that intent is a question of fact for the jury, 52 OHIO JUR. 2d 596, Sec. 101; *C. & St. L. R. Co. v. Krouse*, 30 Ohio State 22. Fraud and the existence thereof and any of its elements, whether alleged fraudulent misrepresentation were in fact made and relied

upon, and whether a statement was made as a statement of fact or of opinion, are generally considered questions of fact for the jury, 52 OHIO JUR. 2d 597, Sec. 102. Hence whether or not Louis Kerr issued checks involved with intent to defraud was a question of fact for the jury after examining the totality of the surrounding circumstances. Therefore, the court could properly comply with counsel's request not to re-charge the jury on intent to defraud, without violating Ohio Revised Code Section 2315.06.

> II. The petition alleges: The failure of the trial court to instruct the jury to limit the application of evidence of other alleged criminal conduct of the accused to the purpose of showing the scheme or plan of the accused attending his action with respect to the crime for which he is being charged constitutes reversible error and a denial of a fair and impartial trial.

The substance of this claim is that a quantity of evidence was admitted which tends to show other offenses committed by the defendant, thereby requiring an instruction by the court limiting the purpose of such testimony to that permitted by the provisions of Revised Code 2945.59. The petition contains some quotations from the record, and record references to other testimony including some testimony elicited by defense counsel.

For the most part the quoted testimony was developed in the course of questioning a particular witness and was relevant to the disclosure of Kerr's method of operation as establishing guilty knowledge and intent to defraud. The record shows few, in any, objections by defense counsel to the testimony of these dealings; in fact, the same or similar testimony was brought out in direct testimony of the petitioner himself. Some of the testi-

mony complained of was from employees and business associates of the corporation: Richard Kissroczi, James Bartels, Bernard Kiel, George Foltz, Francis Biehl, Attorney Morris Blane, Attorney Anthony Nosan, all of whom were testifying as to the operation of Kerr Motors, Inc. and not as to similar acts. The defense presented testimony by attorneys for the corporation, Morris Blane and Anthony Nosan. They testified fully with respect to the operations of the corporation and the pending bankruptcy proceedings. There is no basis for this claim of error.

Incidentally, the State is of the mind that the court wrongly withdrew the testimony of petitioner's past conviction of a State statute. The defendant had admitted such conviction (R. 2120-2121).

> III. The petition alleged: A denial of the right of the accused to confront the witnesses is violative of Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution and such denial constitutes prejudicial error and a denial of due process of law.

Actually the petitioner was not denied any constitutional right of confrontation by reason of the fact that the State did not present the testimony of one Dr. Adelstein and the husband of Susan Cass. The record shows that Susan Cass testified that she and her husband went to L. S. Kerr Motors, Inc. That the car in fact that she bought was hers, but that they put it in her husband's name; that it was her money that paid for the auto. The money for the auto actually came from Mrs. Cass's father.

Nor was any testimony by Dr. Herman Adelstein needed when Mr. Richard Kissroczi testified that he signed the doctor's name to the power of attorney. There simply is no factual basis for petitioner's objections.

IV. The petition alleges: The consolidation of two indictments totaling five separate different offenses, twenty-five counts and forty-four different verdicts denies the accused the right to a fair and impartial trial and is a denial of due process of law as guaranteed under the Ohio and United States Constitutions, and the failure of the trial court to secure a stipulation of record showing defense's acquiescence in such consolidation is prejudicial error. The consolidation of two indictments, totaling five separate different offenses, twenty-five counts, and forty-four different verdicts, created a circumstance which resulted in systematically excluding petitioner from having the effective assistance of counsel and violated the concept of fundamental fairness and prevented defendant from having a fair and impartial trial.

The petitioner states that this is the most precipitous error of this trial. The records shows the following: (R. 5)

"Mr. Smith: I would like to make a motion that the indictments be consolidated in this case. We have two cases here, your Honor.

The Court: Is this by stipulation?

Mr. Smith: Yes, by stipulation.

The Court: The motion is granted. Stipulated by both parties that the indictments be consolidated.

Mr. Smith: All right.

The Court: Anything further, gentlemen?

Mr. Benjamin: Have you got those case numbers here?

Mr. Smith: I have the case numbers. Case No. 79072 and Case No. 79231 be consolidated."

The record permits no conclusion other than that the indictments were consolidated by stipulation. Defense

counsel was present and had it been otherwise he most certainly would have spoken.

Furthermore, the consolidation was proper in the circumstances of this case where all of the offenses were connected in their commission in that they all occurred within a relatively short period of time and arose out of Kerr's financial manipulations in the operation of the automobile sales agency. The statute, Ohio Revised Code Section 2941.04, is in the alternative; the indictment may charge (1) different offenses connected in their commission; *or* (2) different statements of the same offense, *or* (3) two or more offenses of the same class of crimes. Revised Code Section 2941.28 allows the court to sever counts if it is the opinion that Revised Code Section 2941.04 has been violated, but the court in this case felt that all of the crimes were connected to L. S. Kerr, Inc. in their commission, and all parties to this trial agreed that the indictments be consolidated.

The allegation that the consolidation resulted in petitioner's being denied the effective assistance of counsel is utterly without merit. Throughout the trial this petitioner had two experienced trial counsel well able to try his case and protect his rights.

Although petitioner alleges that the consolidation forced one of defense counsel to take the stand and be subjected to cross-examination, he does not specify in what respect such cross-examination was prejudicial. Actually the defense placed one Mr. Nosan, the corporation's attorney, on the stand. He had determined after an examination of the books that the corporation was in financial difficulty, this being the picture that the defense was painting. When he testified with respect to his duties, obligations, and advice to the corporation, cross-examination on such matters was proper. There was no

objection by either the State or the defense to any of his testimony. The confusion which present counsel for the petitioner attributes to trial on the consolidated indictments simply did not exist.

V. The petition alleges: The arbitrary excusing of a juror during the progress of a criminal trial without an explanation of record or consent of the parties and counsel, constitutes reversible error and a denial of a fair and impartial trial.

The applicable statute providing for the discharge of a juror before the conclusion of the trial and replacement with an alternate is Section 2945.29 of the Revised Code of Ohio, not Section 2945.36 referred to by petitioner. Section 2945.29 does not provide that the reason for such discharge shall be entered on the journal. Moreover, no objection was made when the juror in question was replaced with the alternate, and it is only fair to assume that defense counsel agreed that the alternate should be seated.

VI. The petition alleges: Alleged conversations with the accused were indiscriminately admitted into evidence without prior evidence tending to establish the corpus delicti—in derogation with the law of the State of Ohio—thus denying petitioner his right to a fair and impartial trial.

The rule of law laid down in *State v. Miranda*, 94 Ohio St. 364, that there must be some evidence outside of a confession tending to establish the corpus delicti before such confession is admissible, is not involved in this case where no confession by Kerr of his guilt of the offenses was offered by the State. Petitioner seems to be objecting chiefly to testimony by State's witnesses of their conversations with Kerr in the course of their dealings with him

pertaining to the failure to deliver certificates of title and to Mr. Brewster's testimony of his conversataions with Mr. Kerr.

Mr. Brewster, Mr. Richard Kissroczi and Mr. George Foltz were employees and business associates of L. S. Kerr Motors, Inc. Where and from whom they received their orders was part of the state's case because of the corporate identity of L. S. Kerr Motors, Inc. *State v. Steman*, 90 Ohio App. 309.

Mrs. Marcia Nease (R. 93 to the end of her testimony), Mrs. Anna Vogel (R. 169 to the end of her testimony), Mr. Roy Bolton (R. 227 to the end of his testimony), Mr. Jay Williams (R. 283 to the end of his testimony) all testified as to buying cars and not receiving titles. There was nothing in their testimony relating to a confession by Louis S. Kerr. Some of these persons dealt directly with Louis S. Kerr. In the purchase of their automobiles and the conversations complained of dealt with the terms of their purchase and the failure to get their titles.

Furthermore, the record does not show any objection by defense counsel to admission of these conversations. In fact, counsel for Mr. Kerr frequently cross-examined these witnesses as to what had been said to them, either by the Kerr employees or by Kerr himself. And the defendant himself on direct examination testified again and again to his conversations with Mr. Brewster and others.

VII. The petition alleges: Permitting the State to amend counts of an indictment after both the State and defense have rested constitutes an abuse of discretion and a denial of due process of law.

Although petitioner recognizes that Section 2941.30, Ohio Revised Code, permits an amendment of the indict-

ment after both sides have rested, he claims that the amendment in this case denied him the right to cross-examination. However, the petition does not set forth any specific way in which the amendment resulted in his not being able to cross-examine any witness.

> VIII. The petition alleges: The State is not permitted to cross-examine its own witnesses in the absence of laying a foundation therefor, and the raising of prejudicial inferences by the State in cross-examining its own witnesses without substantiating such prejudicial inferences by direct testimony is violative of a far and impartial trial.

The substance of this complaint is that the court improperly permitted cross-examination of Richard Kissroczi, as a hostile witness. To cloud the issue, defendant appends the excerpts from the record at pages 332-338 that he states deal with the matter, but a check of the record would reveal that the witness Richard Kissroczi's testimony starts at page 314 of the record. It is obvious from his testimony that this witness was forgetting important signing incidents in an effort to aid Louis Kerr. The State was rightfully allowed to refresh the witness's memory. The State read parts of the witness's statement in an effort to get him to speak the truth which he voluntarily did after his memory was refreshed (R. 338 to 341). Ohio law permits this procedure. 56 OHIO JUR. 2d 733, Sec. 305; *State v. Duffy,* 134 Ohio St. 16.

IX. The petition alleges: Petitioner was denied a fair and impartial trial and due process of law by the trial court's permitting the prosecutor to engage in a course of conduct and questions that were irrelevant, illegal and prejudicial to the petitioner's rights.

It is noteworthy that petitioner's counsel does not allege that trial counsel made any objection to the prosecutor's questions. Furthermore, the subject matter of this claim of error involves such an elementary proposition as not to require answer, i.e., the great latitude and discretion accorded the trial judge in determining the limits of cross-examination and examination of witnesses.

X. The petition alleges: The procedure employed by the prosecutor of refreshing the witnesses' recollection was, on a number of occasions, a clear violation of criminal procedural requirements without any just cause and constituted a deprivation of petitioner's right to a fair and impartial trial and due process of law.

The petitioner apparently has reference to the witness, Evan B. Brewster, whose recollection was refreshed from documents in his file. Again it is not alleged that trial counsel made any objection, and again the subject matter comes within the latitude and discretion given the trial judge to determine the limits of examination of witnesses.

XII. The petition alleges: The comments and final argument of the prosecuting attorney appealed to the prejudice of the jury and thus denied petitioner a fair and impartial trial.

Other than mentioning that the prosecutor called the petitioner a "con man" the petition herein contains no

examples of the alleged inflammatory and prejudicial remarks of the prosecutor. Defense counsel did not object to the designation of petitioner as a "con man"; moreover the evidence warranted the prosecutor's use of that term. Actually, the prosecutor confined his argument in great part to the facts of the case, and at points his argument was obviously in response to and provoked by defense counsel's argument, wherein a State's witness was referred to as "charmer" (R. 2337); "the internal revenue" (R. 2338); "fleecer" (R. 2354); "a man who through his sheer talent, took from others for his own personal gain" (R. 2354); "evil genius" (R. 2382); "weasel" (R. 2384); "I don't think that Mr. Brewster was pure as the driven snow he alleges" (R. 2387); "prosecution or persecution" (R. 2393); and "I will tell you who the super salesman was, the con artist—not this poor fellow here—Mr. Brewster. He was a master."

At no point was the prosecutor's argument not based on the evidence and the reasonable inferences to be drawn therefrom. At no point was it threatening, or an appeal to convict to meet a public demand, or so prejudicial as to require the trial court's intervention or to amount to a denial of due process.

XIII. The petition alleges: The denial of the trial court of petitioner's motion for a directed verdict, made on the ground that the prosecution had failed to prove venue as to each count, was prejudicial error and a denial of a fair and impartial trial.

The claim of failure of proof to establish venue on four counts is without support in the record. Venue was established as to the counts charging failure to deliver certificates of title to Sam Dituri (R. 139), Andrew Ryba (R. 158), and Rheta Fugueroa (R. 216). As to the check

to Acme Auto Radiator Company, venue was established many times in the record, one such instance being at page 608, where the testimony is that the check was sent to the Euclid-79th Branch of the Cleveland Trust Company, in Cleveland, and more specifically at page 628.

> XIV. The petition alleges: In the trial of a criminal case an accused is entitled to a charge of law that is relevant to all issues of fact, and an omission of law governing the issues or the incorrect stating of the law that results in prejudice to the accused denies that accused his right to a fair and impartial trial.

The defense did not request any special instructions with respect to any of the subjects now complained of, nor did they submit any instruction to the court. In fact, defense counsel stated that they were satisfied with the court's charge. *Rucker v. State,* 119 Ohio St. 189; *Miller v. State,* 125 Ohio St. 415; *Jones v. State,* 20 Ohio St. 34.

It was unquestioned in the testimony that Louis Kerr was the president of the corporation, Kerr Motors, Inc., and the instruction as to corporate officers was therefore proper. The counts for larcency by trick, Section 2907.21, Ohio Revised Code, were properly charged in the indictment, *State v. Healy,* 156 Ohio St. 229, reversing *State v. Healy,* 58 Abs. 33, 95 N.E.2d 244, and the court's charge on this statute was likewise proper.

CONCLUSION.

The record of this trial affirmatively establishes that no fundamental concept of liberty and justice inherent in the concept of due process of law was offended, and that the petitioner had an eminently fair trial.

There was nothing unfair about the consolidation of the indictments for trial. Not only was this done with the

consent of defense counsel but all of the counts arose out of the operation of the Kerr Motors, Inc. agency within a relatively short period of time and were connected in their commission because of the financial condition of the corporation.

The petitioner testified for three days, admitting he did the acts with which he was charged but attributing his conduct to the financial troubles of the business. His testimony and the argument of his counsel amply refutes his claim of confusion resulting from consolidation.

The petitioner has not shown any deprivation of constitutional rights entitling him to review by the Court. The writ should be denied.

Respectfully submitted,

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APPENDIX.

OHIO REVISED CODE, SECTION 2945.29.

2945.29 (13443-13). Jurors becoming unable to perform duties.

If, before the conclusion of the trial, a juror becomes sick, or for other reason is unable to perform his duty, the court may order him to be discharged. In that case, if alternate jurors have been selected, one of them shall be designated to take the place of the juror so discharged. If, after all alternate jurors have been made regular jurors, a juror becomes too incapacitated to perform his duty, and has been discharged by the court, a new juror may be sworn and the trial begin anew, or the jury may be discharged and a new jury then or thereafter impaneled.